No. SC85731

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, EX REL
SAMUEL STEELEY,

Relator,

vs.

THE HONORABLE KENNETH OSWALD,
JUDGE OF THE CIRCUIT COURT OF
MILLER COUNTY, MISSOURI, ASSOCIATE DIVISION,

Respondent.

PETITION FOR WRIT OF PROHIBITION
ASSOCIATE CIRCUIT COURT OF MILLER COUNTY, MISSOURI
THE HONORABLE KENNETH OSWALD, JUDGE

RELATOR'S REPLY BRIEF

Erik A. Bergmanis, Mo. Bar #33151
Matthew C. Price, Mo. Bar #51520
Bergmanis & McDuffey, L.L.C.
Attorneys at Law
380 W. Hwy. 54, Ste. 201
P.O. Box 229
Camdenton, Missouri 65020
Phone: (573) 346-2111
Fax: (573) 346-5885

Attorneys for Relator Samuel Steeley

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

STANDARD OF REVIEW

Respondent's Brief fails to address or controvert the standard of review set forth in Appellant's Brief. Appellant does not disagree with Respondent that in many prohibition cases, review is based upon finding that the trial court usurped its jurisdiction or acted in excess of its jurisdiction. Clearly, as stated in Appellant's initial brief, prohibition is appropriate where it will prevent abuse of judicial discretion or usurpation of judicial power. However, prohibition is also appropriate to prevent irreparable harm to a party. **State ex rel. Director of Revenue, State of Mo. v. Gaertner**, 32 S.W.3d 564, 566 (Mo. banc 2000); **State ex rel. Linthicum v. Calvin**, 57 S.W.3d 855, 857 (Mo. banc 2001); and **State ex rel. York v. Daugherty**, 969 S.W.2d 223, 224 (Mo. banc 1998). See also **State ex rel. Nixon v. Kinder**, 2003 WL 21788869, 2 (Mo. App. W.D. 2003).

Respondent addressed and described the abuse of discretion and usurpation of power standards, but entirely ignored the third standard of irreparable harm espoused in Appellant's initial brief and the cases cited above. Respondent has failed to address Appellant's arguments regarding the appropriate standard of review, thus Appellant will not reargue such points, but will rely on his initial brief which states the appropriate standard of erroneous application or declaration of the law. **State ex rel. Cohen v. Riley**, 994 S.W.2d 546, 549 (Mo. banc 1999).

ARGUMENT

I.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL ERRONEOUSLY DECLARES AND APPLIES THE LAW BY VIOLATING THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT A PRELIMINARY HEARING IS A "CRITICAL STAGE" OF CRIMINAL COURT PROCEEDINGS UNDER THE SIXTH AMENDMENT ENTITLING RELATOR TO CERTAIN FUNDAMENTAL RIGHTS INCLUDING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, THE RIGHT TO EFFECTIVE CONFRONTATION OF WITNESSES, AND THE RIGHT TO A FAIR AND PUBLIC TRIAL, ALL OF WHICH SHOULD PERMIT RELATOR TO RECORD HIS PRELIMINARY HEARING.

Respondent's Brief fails to address Relator's argument. The right to a transcript is clearly not enumerated within the text of the U.S. Constitution; however, the Sixth

Amendment to the United States Constitution does specifically require effective assistance of counsel. **Coleman v. Alabama**, 399 U.S. 1, 9 (1970). The importance of **Coleman** is that the United States Supreme Court defined what effective assistance of counsel means in the context of a preliminary hearing. **Id**.

Respondent's varied arguments regarding fundamental fairness wherein Respondent cites Justice Black's concurring opinion of **Coleman**, as if such opinion was the majority opinion, are inapplicable. Relator is not requesting that this Court expand the United States Constitution under an open ended rubric as suggested by Respondent. Instead, the United States Supreme Court has already defined and limited what effective assistance of counsel means under the United States Constitution in the **Coleman** case. **Id**.

As set forth in Appellant's initial brief, **Coleman** states that the four particular points that encompass the meaning of effective assistance of counsel are:

1) First, the cross-examination of the State's witnesses afforded at a preliminary hearing presents an opportunity for counsel to expose weaknesses in the case which could result in dismissal. **Id**.

2) Second, cross-examination can, **"...fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused . . ."**. **Id**.

3) Third, counsel can conduct more effective and in depth discovery of the State's case in order to prepare a better defense at trial. **Id**.

4) Fourth, the hearing may assist in obtaining bail or psychiatric examination. **Id**.

The United States Supreme Court clearly enumerated that the right to effective assistance of counsel includes the right to use testimony during the preliminary hearing as a tool for impeachment at a later trial. **Id**. Effective assistance of counsel also includes the right to preserve the testimony favorable to the accused for use at a later trial. **Id**.

Appellant is not requesting that this Court expand the United States Constitution or create additional Constitutional requirements out of thin air. However, Appellant is requesting that this Court enforce the right to effective assistance of counsel as defined by the United States Supreme Court. This includes allowing Appellant's counsel to take the steps necessary to provide effective assistance of counsel to Appellant by recording the hearing for the purposes set forth in **Coleman**. **Id**.

Respondent cites several cases for the proposition that there is no entitlement to transcript unless the case is one where homicide is alleged. See **State v. Eaton**, 504 S.W.2d 12, 20 (Mo. 1973); **State v. Champ**, 477 S.W.2d 81, 83; **State v. Quinn**, 405 S.W.2d 895, 899 (Mo. 1966); and **State v. Maxwell**, 400 S.W.2d 156 (Mo. 1966). All but the **Champ** case were cited and distinguished in Relator's initial brief. The same arguments distinguishing the other cases are applicable to **Champ**. In addition, **Quinn** and **Maxwell** were each decided prior to the 1970 **Coleman** case, and do not have bearing on Relator's argument. The **Eaton** and **Champ** cases were decided shortly after

the **Coleman** decision; however, there is no indication that **Coleman** was ever taken into account when those decisions were rendered, nor did the Defendants in either of those cases argue that failure to allow transcription was a violation of their right to effective assistance of counsel. In addition, the courts in the cases cited above relied on statute and rule that were antiquated by the implications of **Coleman** but had never been challenged.

Relator recognizes that Section 544.370 RSMo and Missouri Supreme Court Rule 22.10 (formerly Rule 23.12) require the Court to provide the defendant with a transcript of preliminary hearings in homicide cases, but Relator is not requesting that the State or the Court be required to provide the transcript or the court reporter. Rather, Relator is asking to obtain his own transcript with a court reporter certified by this Court at his own expense. Additionally, Section 544.370 RSMo and Missouri Supreme Court Rule 22.10 (formerly Rule 23.12) were initially adopted **prior to** the decision in **Coleman**, thereby confirming that the said statute and rule were adopted without regard to the implications of **Coleman**.

Given the decision in **Coleman**, Relator suggests that the cases, the statute and the rule are inconsistent with **Coleman** and are an unconstitutional violation of Relator's Sixth Amendment right to effective assistance of counsel, effective confrontation of witnesses, and the right to a fair and public trial.

Respondent's Brief cites **State v. Menteer**, 845 S.W.2d 581 (Mo. App. 1992) and **Gerstein v. Pugh**, 420 U.S. 103 (1975) in an attempt to downplay the importance

of the preliminary hearing in the Missouri criminal process. Respondent also offers an example of a suppression hearing to downplay the significance of a preliminary hearing. This example and these cases are inapplicable and misplaced. **Coleman** has already established that a preliminary hearing is a critical stage of criminal proceedings entitling a defendant to effective assistance of counsel, and this Court has confirmed that a preliminary hearing is a critical stage of criminal proceedings in Missouri. **Coleman** at 9; **State ex rel. Thomas v. Crouch**, 603 S.W.2d 532, 545 (Mo. banc 1980). As such, the key is not what a preliminary hearing establishes or what substantive rights are effected. Rather, the key question is what is needed to provide effective assistance of counsel. The United States Supreme Court provided a road map in **Coleman** for effective assistance of counsel, and Respondent has not addressed Relator's point.

Respondent argues that Relator's request to record is not a quest for truth, but an attempt to avoid truth. Relator is at a loss to respond to this argument. Surely Respondent recognizes that a verbatim recording of actual testimony ensures an accurate record of the event and is the best manner to ensure truthful testimony.

As stated in Relator's initial brief, it is widely accepted that witnesses are less likely to commit perjury when they know that the testimony can be reviewed by the public. **U.S. ex rel. Bennett v. Rundle**, 419 F.2d 599, 606 (3d Cir. 1969). Not only do open proceedings, or in this case, a transcript, prevent perjury, but they preserve the appearance of justice and check judicial abuses. **U.S. v. Cianfrani**, 573 F.2d 835, 852-

853 (3d Cir. 1978).

Denial of transcription of the preliminary hearing prevents effective assistance of counsel and is in direct violation of **Coleman**. Respondent has offered this Court no cases that overrule **Coleman**, nor has Respondent offered this Court any arguments to contradict the elements of effective assistance of counsel found therein. In order to ensure that the Sixth Amendment rights to effective assistance of counsel, effective cross-examination of witnesses, and fair, public trial are protected, and in order to ensure that the United States Supreme Court's justification of requiring counsel at a preliminary hearing is not thwarted and rendered meaningless, Relator should be allowed to have a certified court reporter transcribe his preliminary hearing at his own expense. To deny such request is an erroneous declaration and application of the Sixth Amendment to the United States Constitution.

II.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL ERRONEOUSLY DECLARES THE LEGAL VALIDITY OF TWENTY-SIXTH JUDICIAL CIRCUIT LOCAL RULE 11(3), IN THAT THE SOUTHERN DISTRICT OF MISSOURI COURT OF APPEALS HAS DETERMINED THAT JUDGES WITHIN THE TWENTY-SIXTH JUDICIAL CIRCUIT ARE NOT AUTHORIZED TO DENY A DEFENDANT THE RIGHT TO TRANSCRIBE A PRELIMINARY HEARING.

Respondent raises a specious argument that Relator's second point relied on is subject to dismissal for failure to provide proper authority or explain the lack of authority. Missouri Supreme Court Rule 84.04; **Burkholder ex rel. Burkholder v. Burkholder**, 48 S.W.3d 596, 598 (Mo. 2001); **Thummel v. King**, 570 S.W.2d 679, 687 (Mo. 1978). Relator has not only cited applicable law, but has cited law specific to the same judicial circuit in this case. **State of Missouri ex rel. Ralph Swindle v. The Honorable Greg Kays** (Mo. App. 1995), arose out of an action in Camden County, Missouri. **State of Missouri ex rel. Joy Lynn Hardey v. The Honorable**

Greg Kays (Mo. App. 1996) arose out of an action in Laclede County, Missouri. In each of those non-homicide cases, the Southern District granted a writ of prohibition, and ordered the judge to allow recording of the preliminary hearing by a certified court reporter. As such, Relator has provided ample authority.

Respondent also argues that Twenty-Sixth Judicial Circuit Local Rule 11(3) is not in conflict with the writs issued by the Southern District. The second writ issued by the Southern District reads as follows, "You are further advised to consider the consequences of further enforcement of the alleged policy of not permitting the use of a court reporter in a preliminary hearing under the circumstances which exist in this case." Relator believes that the writ orders are very clear that a request to record a preliminary hearing at the defendant's expense in a non-homicide case is not to be denied or dire consequences will result. Relator suggests that if Respondent's interpretation of Twenty-Sixth Judicial Circuit Local Rule 11(3) is correct, the rule is in direct contradiction to the existing writs, and the judges of the circuit were in direct violation of the existing writs by implementing a local rule allowing what was prohibited by the superior court. This is very apparent bootstrapping, and Twenty-Sixth Judicial Circuit Local Rule 11(3) is not valid if Respondent's interpretation of the rule is correct.

Respondent then declares that the writs issued by the Southern District are not applicable to the Honorable Judge Oswald. Respondent relies on **State ex rel. Siegel v. Strother**, 289 S.W.2d 73 (Mo. 1956). This case states that a writ of prohibition is

issued against a court and not an individual judge. **Id**. at 78. As a result, any judge with notice of the writ is prohibited from acting upon the authority of the prohibited court. **Id**. Respondent seems to have interpreted this as authority that a writ is not applicable to other judges within the same court circuit. **Siegel** does not say this, nor does it address the issue that Respondent would like it to address.

Further, the two Southern District writs, including the written orders, were brought to the attention of the Honorable Judge Kenneth Oswald when Relator requested the opportunity to have a certified court reporter transcribe his preliminary hearing. The Honorable Judge Oswald was given notice of the existence of the writs. Despite the knowledge that the Missouri Southern District Court of Appeals had already prohibited this action multiple times in the very same judicial circuit, the Honorable Judge Kenneth Oswald denied Relator's request. To deny such request is an erroneous declaration and application of the applicable law as interpreted by the Missouri Southern District Court of Appeals.

III.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL IS AN ERRONEOUS DECLARATION AND APPLICATION OF THE LAW IN THAT THERE IS NO CONSTITUTIONAL PROVISION, STATE LAW, SUPREME COURT RULE, OR LOCAL RULE THAT AUTHORIZES AN ASSOCIATE CIRCUIT JUDGE TO DENY RELATOR THE RIGHT TO HAVE RELATOR'S OWN CERTIFIED COURT REPORTER TRANSCRIBE RELATOR'S PRELIMINARY HEARING AT HIS OWN EXPENSE, AND TWENTY-SIXTH JUDICIAL CIRCUIT LOCAL RULE 11(3) DOES NOT ALLOW A JUDGE TO DENY TRANSCRIPTION OF A PRELIMINARY HEARING AT RELATOR'S EXPENSE.

Respondent again raises a specious argument that Relator's third point relied on is subject to dismissal for failure to provide proper authority or explain the lack of authority. Missouri Supreme Court Rule 84.04; **Burkholder ex rel. Burkholder v. Burkholder**, 48 S.W.3d 596, 598 (Mo. 2001); **Thummel v. King**, 570 S.W.2d 679, 687 (Mo. 1978). Relator cited both Missouri Supreme Court Rule 14 and the

applicable text of Twenty-Sixth Judicial Circuit Local Rule 11(3) in support of his point relied on. Further, there have been no cases which interpret the true meaning of Twenty-Sixth Judicial Circuit Local Rule 11(3). As such, Relator has properly placed the interpretation of this rule squarely in front of the appropriate authority to determine the meaning of the rule, and this point is in no way abandoned.

Respondent argues that a reading of the local rule as a whole does not support Relator's position. Relator disagrees but believes that Respondent's argument has been thoroughly addressed by Relator's initial brief and refers to that argument in response to Respondent's contentions.

Finally Respondent alleges that Relator has other remedies more appropriate than a writ of prohibition if Relator is correct. Beginning with his Jurisdictional Statement and Standard of Review, Relator has addressed the issue of the irreparable harm that will result if a writ does not issue and the appropriateness of a writ in this instance. A writ is the appropriate remedy here, and Relator refers to his Jurisdictional Statement and Standard of Review for a more detailed response to Respondent's failed contention.

IV.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL ERRONEOUSLY DECLARES AND APPLIES THE LAW IN VIOLATION OF SECTION 544.390 RSMO IN THAT SECTION 544.390 RSMO REQUIRES AN ASSOCIATE JUDGE TO CERTIFY ALL EXAMINATIONS CONDUCTED PURSUANT TO ANY OF THE PROVISIONS OF CHAPTER 544 RSMO AND DELIVER A CERTIFIED COPY OF SUCH EXAMINATION TO THE CLERK OF THE COURT.

Respondent cites **State v. Fleming** for the proposition that Section 544.390 RSMo has been entirely overruled by former Missouri Supreme Court Rule 23.11 (now Rule 22.09(c) paragraph 2). **State v. Fleming**, 451 S.W.2d 119 (Mo. 1970). In **Fleming**, the State argued that there was no requirement that a copy of the preliminary hearing examination be delivered **to the jailer**. **Id**. at 120. The basis for this argument was that former Missouri Supreme Court Rule 23.11 was adopted after the statute was enacted and eliminated the requirement that examinations be delivered to the jailer. **Id**. The court stated that, "...the rule, inconsistent with the statute to this extent, adopted by

the Court under the express authority of the Constitution, Article V, s 5, V.A.M.S., superseded the statute..." **Id**. In other words, Section 544.390 RSMo was inconsistent with the later court rule in that the rule eliminated the requirement of delivery **to the jailer**; however, the rule did not eliminate the requirement of delivery to the clerk of the court. As such, the portion of the statute requiring examinations be delivered to the clerk of the court is not in conflict with former Rule 23.11, has not been overruled by former Rule 23.11, and remains in full effect. Respondent's reliance on **Fleming** is misplaced and said case is not on point.

Respondent also cites **State v. Ancell** for the proposition that Section 544.390 RSMo does not require a court to certify and deliver a transcript of a preliminary hearing. **State v. Ancell**, 62 S.W.2d 443, 447 (Mo. 1933). Respondent's reliance on such case is misplaced for several reasons. First, **Ancell** was decided in 1933, which was six years prior to the implementation of the current and applicable Section 544.390 RSMo upon which Relator bases his point. Second, the portion of the **Ancell** case quoted and relied upon by Respondent was dicta and had no relation to the issues of that case. **Ancell** was actually a homicide case in which a shorthand transcript was taken and heard by one judge, but then certified and docketed by another judge. **Id**. at 448. As such, the **Ancell** case is not applicable, and its dicta should be given no weight.

Section 544.390 RSMo requires that all examinations be taken by the defendant or the state and then certified by the judge. According to **State v. Hughey**, 404 S.W.2d 725,729 (Mo. 1966) the purpose of Section 544.390 RSMo is to assure a fair

preliminary examination and to preserve the evidences taken. Surely this purpose is applicable in all felony cases. Denial of Relator's request to provide a certified court reporter, at his own expense, in order to obtain a record of the proceeding is an erroneous declaration and application of Section 544.390 RSMo.

CONCLUSION

The Constitutional right to effective assistance of counsel is undebatable. The United States Supreme Court has defined "effective assistance of counsel" to include the right to use a transcript of a preliminary hearing as a later tool for impeachment of the State's witnesses at trial or to preserve favorable testimony. See **Coleman v. Alabama**, 399 U.S. 1, 10 (1970). Relator cannot use the preliminary hearing as an impeachment tool or to preserve testimony if no record is allowed to be made of such hearing. Denial of such a recording amounts to a denial of effective assistance of counsel.

Aside from the implications of **Coleman**, the criminal court process is a quest for truth. As stated in Relator's initial brief, transparency of the system is paramount to truth in the United States Court system. This is true in all stages of a proceeding, not just a trial. *Note*, **The Right to Attend Criminal Hearings**, 78 Colum. L. Rev. 1308 (1978). Allowing a certified record, at Relator's own expense, does not prejudice the prosecution, but denial of such a record deeply prejudices Relator's right to effective assistance of counsel and the court system's ultimate quest for truth.

The Honorable Judge Kenneth Oswald has erroneously declared and applied the law and the issuance of a writ of prohibition is appropriate to prevent such erroneous declaration to continue in Relator's case and any future felony criminal cases in the Twenty-Sixth Judicial Circuit. Further, such writ is necessary to prevent irreparable

harm to Relator.

BERGMANIS & McDUFFEY, L.L.C.

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Erik A. Bergmanis, Mo. Bar #33151

BY:_____
Matthew C. Price, Mo. Bar #51520
Attorneys at Law
380 W. Hwy. 54, Ste. 201
P.O. Box 229
Camdenton, MO 65020
Phone: (573) 346-2111
Fax: (573) 346-5885

ATTORNEYS FOR RELATOR
SAMUEL STEELEY

CERTIFICATE OF SERVICE AND OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 3742 words, excluding the cover, this certification and the appendix, as determined by Word Perfect 8 software;

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 4th day of June, 2004, to Robert J. Seek, Prosecuting Attorney of Miller County, P.O. Box 12, Tuscumbia, MO 65082.

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ERIK A. BERGMANIS

RELATOR'S APPENDIX

RELATOR'S APPENDIX INDEX